Nos. 92-6291, 92-6455, 92-6484, and 92-6591

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JAMES SHERROD, PETITIONER

v.

UNITED STATES OF AMERICA

JERRY WAYNE SEWELL II, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES EDWIN SHERROD, PETITIONER

v.

UNITED STATES OF AMERICA

JERRY WAYNE SEWELL, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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19 pp

QUESTIONS PRESENTED

1. Whether the government's on-site destruction, because of contamination, of the "mixtures" containing controlled substances and the containers holding the mixtures violated petitioners' rights to due process and confrontation.

2. Whether a solution of methamphetamine and its chemical by-products is a "mixture or substance containing a detectable amount of methamphetamine" for purposes of 21 U.S.C. 841(b) and Sentencing Guidelines §2D1.1, without regard to whether the solution is ingestible or marketable.

3. Whether the evidence was sufficient to convict petitioner Jerry Wayne Sewell II.

4. Whether the Attorney General's exercise of his statutory authority to exempt an over-the-counter product containing methamphetamine from the prohibitions of the controlled substance laws denied petitioner Sherrod equal protection of the law.

5. Whether, in determining petitioner Jerry Wayne Sewell, Sr.'s, criminal history category for sentencing purposes, three previous convictions occurring at different times were properly given separate scores, even though at one time the charges might have been joined in a single indictment.

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OPINION BELOW

The initial opinion of the court of appeals, Pet. App. A,[1] is reported at 964 F.2d 1501. The opinion of the court of appeals on rehearing, Pet. App. B, is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1992. Petitions for rehearing were denied on August 3, 1992. The petitions for a writ of certiorari were filed on September 21, 1992, in No. 92-6291 and on November 2, 1992 (a Monday), in Nos. 92-6455, 92-6484, and 92-6591. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Texas, petitioners were convicted of conspiring to manufacture and possess controlled substances with the intent to distribute them, manufacturing phenylacetone, and manufacturing a mixture containing methamphetamine, in violation of 21 U.S.C. 846 and 841(a). Petitioner Sherrod was sentenced to 240 months' imprisonment; petitioner Jerry Wayne Sewell II was sentenced to 60 months' imprisonment; and petitioner Jerry Wayne Sewell, Sr., was sentenced to 360 months' imprisonment. Each petitioner's sentence was to be followed by a five-year period of supervised release. The court of appeals affirmed.

1. Early in 1989 the Sheriff's Department of Calcasieu Parish, Louisiana, recruited Danny Johnson as a confidential

[1] "Pet. App." refers to the appendix to the petition in No. 92-6484.

informant to assist in identifying drug traffickers in that area. Among the names that Johnson furnished to the authorities were that of petitioner Jerry Wayne Sewell, Sr. (Sewell), who had been Johnson's exclusive supplier of methamphetamine for resale since 1987, and co-defendant Lonnie Jerrell Cooper.[2] One of the primary goals of the investigation was to locate Sewell's source of supply. Pet. App. A, at 1503; Gov't C.A. Br. 3-4.

The investigation first focused upon Sewell's connection with "Fred," his source for methamphetamine in San Antonio, Texas. Because Sewell was heavily indebted to Fred, he wished to avoid contacting him and began making arrangements to manufacture his own supply of amphetamine and methamphetamine near Orange, Texas. Johnson attended several meetings with Sewell concerning the venture, which were held in Cooper's auto mechanic shop in Mossville, Louisiana. Pet. App. A, at 1503; Gov't C.A. Br. 5-7.

Sewell hired petitioner Sherrod, a chemist, to manufacture the controlled substances. At a meeting on March 7, attended by Jerry Wayne Sewell II (Jerry), Johnson told Sewell that Sherrod was capable of manufacturing amphetamine and methamphetamine. Sewell remarked that they would take no action until he received a call from Cooper stating that the laboratory was set up and indicating what items were needed for the manufacturing process. That evening Cooper called and presented a list of missing items. Gov't C.A. Br. 7-8.

[2] Cooper was tried jointly with petitioners and convicted. His petition for a writ of certiorari, No. 92-5991, was denied on December 14, 1992.

The next day Johnson, Sherrod, and two others drove to Dallas and secured the missing items with money provided by Sewell. They then returned to Sewell's house. Sherrod removed the items from their containers, examined each one, isolated the ones he could use, and decided that he still needed a few items. The equipment was placed in the trunk of a Cadillac furnished by one of the co-conspirators. Jerry helped load the equipment into the car. Pet. App. A, at 1503-1504; Gov't C.A. Br. 8-9.

Johnson, Sherrod, and two others drove the car to Johnson's apartment in Lake Charles, Louisiana. At some point during the trip, Sherrod commented that Sewell would have $1,000,000 in six months. The next morning Cooper led the four men to the laboratory, an abandoned school bus located on property owned by co-conspirator Danny Gene Hill. The chemicals and glassware were unloaded, and after a missing flask was obtained, Sherrod began the manufacturing process. He expected the process to be done in 72 hours. Johnson kept Sewell informed of Sherrod's progress by telephone. He also spoke with law enforcement officers. Pet. App. A, at 1504; Gov't C.A. Br. 9-12.

The officers maintained a constant surveillance of Hill's property. On the morning of March 11 they obtained a search warrant for the premises, together with a court order authorizing the destruction of chemical mixtures found at the site because of their toxicity. When the warrant was executed later that day the officers discovered a fully operating methamphetamine laboratory. George Lester, a DEA chemist, found methamphetamine mixtures in a

large baking pan, a Coca Cola syrup canister, and a mason jar. Because Lester regarded the solutions and their containers as contaminated, they were destroyed after samples were preserved for analysis. DEA agent Milton Shoquist took exact measurements of the baking pan before its destruction. At the time of the search, Lester estimated that the three mixtures containing methamphetamine had a combined weight of 4.5 kilograms. Pet. App. A, at 1504-1505; Gov't C.A. Br. 12-16.

2. Petitioners and their co-conspirators were arrested and indicted. In preparation for trial, Agent Shoquist obtained from the Coca Cola Company a syrup canister similar to the one that had been found and destroyed at the laboratory site. Shoquist ascertained that the cylinder held 22 liters when full.

Lester was advised of the calculation. Based on that measurement, and on his observation that the canister at the methamphetamine laboratory had been half full, Lester calculated the weight of the mixture found in the canister as 11 kilograms. In addition, based on the detailed measurements taken by Shoquist of the large baking pan before it was destroyed, Laster calculated the weight of the mixture found in the pan as 6 kilograms. Adding the weight of the mixture in the mason jar (0.5 kilograms) to the weight of the mixtures in the other two containers, Lester determined that the total weight of the mixtures containing methamphetamine was 17.5 kilograms. At trial, Lester testified about his calculations. Pet. App. A, at 1508; Gov't C.A. Br. 17.

The presentence reports credited Lester's figure of 17.5 kilograms of methamphetamine mixture and noted certain trial testimony that, in addition to the methamphetamine mixture, law enforcement officers had found 4.75 liters of phenylacetone, a methamphetamine precursor. As required by the Drug Equivalency Table of the Sentencing Guidelines, the presentence report converted these mixtures into 38.95 kilograms of cocaine (35 kilograms for the methamphetamine mixture and 3.95 kilograms for the phenylacetone), a quantity that placed petitioners at base level 34. Upward and downward adjustments were made from that base level to reach a final offense level for each petitioner.

3. The court of appeals affirmed. The court rejected petitioners' claims that they were denied their constitutional rights to due process and confrontation because the government had destroyed the chemical mixtures (other than the retained samples) and the containers without accurately measuring the mixtures or allowing petitioners the opportunity to measure them. Pet. App. A., at 1506-1507. The court noted that the quantity of drugs involved was not an element of the offense, but only a sentencing factor. Id. at 1507. The court also noted that, despite having ample notice of the government's calculation prior to sentencing, petitioners failed to recall Lester to the stand to testify regarding his calculation of the volumes of the canister and the pan. Ibid. Petitioner Sherrod and co-defendant Hill had testified about the quantity of drugs at their sentencing hearings, and the others had relied upon that testimony on the issue of quantity.

The court of appeals concluded that the district court was entitled to find the government's evidence more credible than the defendants' testimony. Ibid.

The court of appeals also rejected petitioners' challenges to the district court's finding on the quantity involved. The court noted that Lester's original on-site estimates "were not based on any accurate measurements made at the scene, but were conservative guesses of the amounts of the mixtures" that had later been credibly shown by the government's trial evidence to be significantly understated. Id. at 1508.[3] The court therefore concluded that "[t]he mere existence of a discrepancy between the original estimate and the evidence introduced at trial does not render the district court's use of the 17.5 kilogram amount clearly erroneous." Ibid.

In addition, the court of appeals rejected the argument that the sentence should have been based solely upon the amount of pure methamphetamine that could have been produced. Pet. App. A, at 1509-1511. The court noted that it was "not faced here with a situation where a defendant discards some independently acquired methamphetamine into his fishpond or stock tank. Instead, the defendants here were convicted of manufacturing methamphetamine

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[3] The court also noted that although petitioners relied "vociferously" on the apparent discrepancy between the original estimate of 4.5 kilograms and the final calculation of 17.5 kilograms," the Guidelines rendered the bulk of that disparity irrelevant. Id. at 1508 n.20. Under the Guidelines, "the same sentencing increase would have resulted if the Government's final calculations had been of 5.5 kilograms of the methamphetamine mixture, merely one kilogram (of methamphetamine mixture) more than (Lester's) original 'conservative' estimate." Ibid.

* * * and conspiracy to do so, and the samples tested by the government of the mixtures found in the laboratory were in the formative stages of the manufacturing process." Id. at 1511. In those circumstances, the court concluded that the plain language of the statute and Guidelines, as well as this Court's decision in Chapman v. United States, 111 S. Ct. 1919 (1991), required the entire weight of the mixtures to be considered for sentencing purposes. Pet. App. A, at 1509-1511.

Finally, the court rejected petitioners' claim of a denial of equal protection because the manufacturer of Rynal, an over-the-counter product containing methamphetamine, was not subject to prosecution. Pet. App. A, at 1512. Rynal (since removed from the schedule of exempted controlled substances) was placed on a list of products exempted from the prohibitions of the controlled substance laws pursuant to 21 U.S.C. 811(g)(1), which authorizes the Attorney General to exclude by regulation "any non-narcotic substance from a schedule if such substance may, under the Federal Food, Drug, and Cosmetic Act, be lawfully sold over the counter without a prescription." Pet. App. A, at 1512.

The court observed that petitioners never demonstrated that their product was eligible for the exemption or that petitioners attempted to make use of the procedure for obtaining an exemption and were denied. Moreover, because the situation did not implicate either a suspect classification or the exercise of a fundamental right, the different treatment of petitioners was subject only to a rational basis analysis. The court found that in light of the

medicinal benefit of Rynal and its reduced potential for abuse the different treatment of Rynal and other substances containing methamphetamine satisfied that standard of review. Pet. App. A, at 1512.

ARGUMENT

1. All three petitioners contend that the destruction of the chemicals and containers found at the laboratory constituted outrageous government conduct that violated their rights under the Due Process and Confrontation Clauses. 92-6291 Pet. 27-35; 92-6455 Pet. 11-15; 92-6484 Pet. 9-22; 92-6591 Pet. 12-20.[4] The court of appeals correctly rejected that claim. Petitioners' claim is the same as the argument made by their co-defendant in Cooper v. United States, cert. denied, No. 92-5991 (Dec. 14, 1992). We addressed that argument in our brief in opposition in Cooper and have supplied a copy of our opposition in that case to petitioners. We rely on that argument here.

Petitioner Jerry Wayne Sewell II expands his claim by citing incidents such as the use of a non-commissioned law enforcement officer in the investigation, Johnson's consumption of drugs while serving as an informant, and the failure to corroborate Johnson's testimony implicating him. 92-6455 Pet. 12-13. Those incidents

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[4] Two petitions on behalf of James Sherrod have been docketed. The first, No. 92-6291, was prepared by Sherrod pro se. The second, No. 92-6484, was prepared by appointed counsel for Sherrod. Both petitions present questions regarding the destruction of evidence and the calculation of the amount of the drugs. In the pro se petition, Sherrod also alleges error arising from the Attorney General's exemption of Rynal from the schedule of prohibited controlled substances.

were not presented to the court of appeals for review, so that court cannot be faulted for not addressing them. In any event, they do not reflect conduct so outrageous that it could bar the government from prosecuting petitioner for his crimes. See United States v. Russell, 411 U.S. 423, 432 (1973).

2. Petitioners contend that the district court erred in counting the weight of the non-marketable, non-ingestible portion of the methamphetamine mixture when determining their sentences. 92-6281 Pet. 19-26; 92-6455 Pet. 15-17; 92-6484 Pet. 22-30; 92-6591 Pet. 7-12. In our response in Cooper, we discussed that issue at length; we rely on that response here. Moreover, in light of this Court's recent treatment of similar claims, there is no basis for further review of petitioners' claim. Three times last Term and twice previously this Term this Court has declined to review that question. See Cooper v. United States, cert. denied, No. 92-5991 (Dec. 14, 1992); Walker v. United States, 113 S. Ct. 443 (1992); Mahecha-Onofre v. United States, 112 S. Ct. 648 (1992); Beltran-Felix v. United States, 112 S. Ct. 955 (1992); Fowner v. United States, 112 S. Ct. 1998 (1992). Because nothing has changed since this Court denied review in those cases, there is no reason to treat these petitions differently.

3. Petitioner Jerry Wayne Sewell II asserts that the evidence was insufficient to support his conviction. 92-6455 Pet. 18-25. Because "[t]he primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals," Hamling v. United States, 418 U.S. 87, 124

(1974), that fact-bound claim does not warrant review by the Court. In any event, when the evidence is examined in the light most favorable to the government, see Jackson v. Virginia, 443 U.S. 307, 319 (1979); Glasser v. United States, 315 U.S. 60, 80 (1942), it supports the jury's verdict.

Jerry Wayne Sewell II (Jerry) was no stranger to the drug world. Shortly before this conspiracy began, Jerry traveled with his father, petitioner Jerry Wayne Sewell, Sr. (Sewell), to Florida, where they sold 150 pounds of marijuana for $68,000. Jerry also delivered a payment to one "Fred" in San Antonio and received a half-pound of methamphetamine, which Jerry took to Dallas. On occasion Jerry helped his father sell methamphetamine. The evidence implicating Jerry in the conspiracy charged in the indictment showed that Jerry was at his father's home when Sewell had an open discussion with three other co-conspirators, including Sherrod, concerning the plan to manufacture methamphetamine. Sherrod discussed the chemicals and equipment that he needed to complete the process. Sewell directed co-conspirator Darlene Roznovsky and Jerry to retrieve the items, and they later returned to the house with chemicals and other equipment stored in boxes and bags. Thereafter, Jerry helped load the boxes of chemicals and glassware into a vehicle so that they could be driven off to the laboratory. Pet. App. B, at 6-15; Gov't C.A. Br. 8-9, 34-35.

With the record in that posture, Jerry's claim of insufficient evidence is totally unpersuasive. He does not deny that the evidence, adduced primarily from informant Johnson, appears in the

record; he merely cites testimony of other witnesses who had been present at the time Jerry assisted the conspirators and who were not as certain as Johnson that Jerry had participated in the activities. His claim rests, at bottom, on a challenge to the credibility of witnesses. That is a matter for the jury, not an appellate court, to determine. See United States v. Bailey, 444 U.S. 394, 414-415 (1981). The jury's decision to credit Johnson's testimony implicating Jerry deserves no further review.

4. In his pro se petition, Sherrod claims that he was denied the equal protection of the laws because the manufacturers of Rynal Spray, an inhalant, had been exempted from criminal liability, even though their product contained a small amount of methamphetamine. 92-6291 Pet. 35-44. The court of appeals correctly denied relief.

In 21 U.S.C. 811(g), Congress authorized the Attorney General to exclude by regulation any non-narcotic substance from the schedule of controlled substances if that substance could be lawfully sold over the counter under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 et seq. Acting under the authority granted by that law, the Attorney General at one time exempted Rynal Spray. The exemption was authorized only after the manufacturers had followed the carefully delineated administrative procedures set forth in 21 C.F.R. 1308.21.

At the time of petitioners' conspiracy, Rynal was still on the list of exempt items. 21 C.F.R. 1308.22 (1988); Pet. App. A, at 1512. Sherrod's claim is that he was denied equal protection because the manufacturers of Rynal, which contained a greater

strength of methamphetamine than the strength of the methamphetamine found in the pan at his laboratory, were exempt from prosecution, but he was not. That contention is meritless.

The exemption enacted by Congress to the statute making it a crime to manufacture methamphetamine reflects the judgment that in certain narrow, closely monitored situations, the benefit to the public from decriminalizing a commercial product containing a controlled substance outweighs the harm from permitting consumption of the product. That legislative judgment is reasonable. Sherrod, who bore the burden of demonstrating that the exemption was unreasonable, see New York State Club Ass'n v. New York City, 487 U.S. 1, 17 (1988), has not carried that burden. He has not shown that he ever applied for exempt status and was rejected, or that the societal benefit from access to his product (such as it was) is so manifest as to make the need for seeking the Attorney General's approval constitutionally unfair.

The comparative strength of the methamphetamine in the products is irrelevant. By granting an exemption for Rynal, the Attorney General did not generally decriminalize methamphetamine production as long as the strength of the controlled substance in the overall product was weak.

Sherrod also has not shown that any section of the drug abuse laws has been implemented or enforced by the Attorney General in an arbitrary or discriminatory manner. Nor is there any indication that individuals, including Sherrod, were actually confused by its provisions. His obligation under the laws was clear: He could not

manufacture methamphetamine. He was properly tried and convicted for violating those laws.

5. Petitioner Jerry Wayne Sewell, Sr., claims that he was erroneously treated as a "career offender" under the Sentencing Guidelines. 92-6591 Pet. 20-24. That claim does not warrant review by this Court.[5]

The presentence report (PSR) stated that Sewell had three prior convictions for delivering controlled substances. The convictions occurred at separate trials on separate days 14 months apart even though, as the PSR noted, Sewell had been arrested for two of the three violations on the same day.[6] The PSR assigned three criminal history points to each conviction. As a result, Sewell was deemed a career offender under Sentencing Guidelines § 4B1.1, with a criminal history category of VI. Combined with a base offense level of 38, Sewell Sr. was sentenced to imprisonment for concurrent 360-month terms.[7]

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[5] Sewell did not raise that issue in the court of appeals until he filed his reply brief, and the court of appeals did not address it in its opinion upholding Sewell's conviction and sentence. Sewell renewed his claim in a petition for rehearing. In its order denying rehearing the Fifth Circuit said that, absent exceptional circumstances, it does not consider matters raised for the first time in a petition for rehearing. Nevertheless, the panel addressed Sewell's claim and found it meritless. Pet. App. B, at 2-5.

[6] Petitioner says that he was arrested for all three offenses on the same day. The PSR, however, states that he was arrested for two offenses on February 4, 1977, and for the other offense 20 days later. PSR 7.

[7] The government argued that Sewell was subject to a mandatory life sentence. The district court imposed a 360-month prison term, however, and the court of appeals rejected the government's argument on cross-appeal that the sentence was unlawful.

In his belated argument to the court of appeals, Sewell claimed that all three controlled substance convictions arose out of a common episode and therefore should have been consolidated for purposes of calculating his criminal history score. Although he offered no documentary support for his allegations, Sewell maintained that he was initially charged with all three offenses in a single indictment; that because he refused to plea bargain the State of Texas issued separate indictments on each of the drug distribution charges; and that consequently he was tried and convicted separately for each of the offenses.

In denying Sewell's petition for rehearing, the court of appeals stated that Sewell had not demonstrated that the PSR was erroneous in assessing three points for each conviction. The court cited Sentencing Guidelines § 4A1.1(a) (1990), which directs a court to add three points for each prior sentence of imprisonment exceeding one year and one month; § 4A1.2(a)(2), which provides that prior sentences in "related cases" should be treated as one sentence; and Application Note 3 to Section 4A1.2, which defines "related cases" as cases occurring on a single occasion, cases that were part of a single common scheme or plan, or cases consolidated for trial or sentencing. United States Sentencing Comm'n, Guidelines Manual 4.7 (1990). Relying on those provisions, the court held that a showing merely that the three convictions all involved controlled substances, or stemmed from what at one time were different charges in the same indictment, did not render the cases "related" for purposes of the career offender Guidelines.

Therefore, the court of appeals was correct in ruling that "[e]ven had Sewell, Sr. raised this issue in his brief on appeal, we would find that the district court's sentencing of Sewell, Sr. on the basis of the three prior convictions was not clearly erroneous." Pet. App. B, at 4.

Sewell challenges the court of appeals' ruling. He does so by going outside the record, claiming primarily that he was entitled to relief because the indictment that was superseded had alleged all three offenses. Sewell once again maintains that but for his refusal to plea bargain, he would have been tried just once. He persists in his belief that the single indictment was enough to allow a consolidation of the three convictions for purposes of determining his criminal history status.

As the court of appeals observed, the indictment is not the factor that determines whether prior convictions should be consolidated when calculating criminal history points. Sewell has failed to demonstrate that the previous convictions qualified for consideration as related cases because they occurred on the same occasion, were part of a single common scheme or plan, or were consolidated for trial and sentencing. Absent such a showing, the three convictions were properly treated as unrelated.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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